Wm. Witherspoon, R-1

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

7878

FILE: B-191116 DATE: October 2, 1978

MATTER OF: Essex Electro Engineers, Inc.

DIGEST:

1. Product qualification clause in RFP restricting acceptance of offers to those submitted by firms marketing generators to civil airline market is matter of technical acceptability, not responsibility, since requirement goes to product offered, not capability of offeror.

2. Product qualification clause restricting acceptance of offers to those submitted by firms marketing generators to civil airline market is not unduly restrictive of competition, since civil airline market is only market with same minimum needs as agency, agency justified minimum needs, specifications reflecting minimum needs did not exist, and adequate competition was, in fact, achieved.

3. Protest allegations that formal advertising should have been used for procurement and that time for meeting first article testing was too short are untimely, since they are alleged patent solicitation defects not raised before closing date for initial proposals as required by 4 C.F.R. § 20.2(b)(1).

Essex Electro Engineers, Inc. (Essex), has protested the rejection of its proposal and the proposed award of a contract for 136 72-Kilowatt (KW) 400-Hertz (HZ) Diesel Engine Generator Sets (DEGS) under request for proposals (RFP) No. F04606-78-R-0199, issued by the Sacramento Air Logistics Center, McClellan Air Force Base, California. Essex has alleged that

the product qualification clause of the RFP is characterized in terms of "responsiveness" when it actually concerns "responsibility" and that the clause is unduly restrictive of competition because it limits competition to firms in one commercial market.

I. Background

This procurement was initiated to obtain 72KW 400HZ DEGS for use with C-5 and C-141 aircraft. This need was determined to exist when a military aircraft (MAC) field test showed that diesel generators were superior to the gas turbine generators that had been used. The MAC test evaluated four generators--two models used by the civil aviation industry and two model built to existing Government specifications and used by the Government. According to the Department of the Air Force (Air Force), while all four generators met minimum aircraft electrical needs, the two commercially used generators were "clearly superior" in other ways, such as fuel tank capacity, serviceability, reliability and quality of materials.

As a result of the tests, the generator requirement was selected to become part of the Department of Defense's Commercial Commodity Acquisition Program (CCAP). The program implements an Office of Federal Procurement Policy policy encouraging the Government to purchase commercial off-the-shelf products when they will serve the Government's needs, provided the products have an established commercial market acceptability. In CCAP procurements, the requirement for commercial market acceptability is included in the solicitation as a "minimum need." For that purpose, the following clause was included in the RFP:

"C-65. PRODUCT QUALIFICATION

"(1) In order to obtain a generator set of demonstrated reliability without the need for complete qualification testing and to permit the Air Force to receive the benefit of commercially

developed products and product improvements, established quality control programs, broad based parts availability and the assurance of achieving timely compliance with federal safety and environmental protection regulations, the following applies:

"(a) Proposals will be accepted and considered only from those offerors, determined by the Government to currently manufacture commercial 72KW 400HZ generator sets on a production line basis and currently market them to the commercial airline industry in substantial quantitites and who propose to furnish representative generator sets. A representative generator set is a standard generator set as depicted in the manufacturer's commercially published data book for 72KW 400HZ which, with standard options and accessories, is a commercial production model offered to and in use by the commercial airline industry.

"(b) The manufacturing of commercial 72KW 400HZ generator sets on a production line basis and the marketing to the commercial airline industry of such generator sets will be the basis for Government reliance that representative generator sets to be procured hereunder are acceptable."

Prior to the closing date for receipt of proposals, Essex protested against inclusion of this clause in the RFP. Essex did, however, submit a proposal which was rejected as "nonresponsive" for failure to meet the requirements of clause C-65. Essex then amended its protest to include a protest against the rejection of its proposal.

II. Technical Acceptability/Responsibility

Essex argues that clause C-65 is actually concerned with the responsibility of offerors rather than the "responsiveness" of the product being offered. Since the concept of responsiveness is inapposite to negotiated procurements, we assume that Essex and the Air Force are referring to the issue of technical acceptability. Essex argues that the finding that it could not comply with clause C-65 is a matter of responsibility and, since Essex is a small business, any finding of nonresponsibility must be referred to the Small Business Administration for possible issuance of a certificate of competency.

In International Harvester Company, B-189794, February 9, 1978, 78-1 CPD 119, the protester argued that an almost identical clause was a matter of responsibility. We stated, however, that "* * * the clause goes to what product must be offered." It is our opinion that clause C-65 also defines the class of technically acceptable products. According to the Air Force, only the civil airline market has the same generator needs as it has and existing Government generator specifications do not reflect these needs. Therefore, clause C-65 attempts to ensure that products offered meet the Air Force's needs by accepting proposals only from offerors who furnish generators to the airline market and who are offering generators proven in that market.

III. Restrictiveness of Clause C-65

Essex argues that clause C-65 unduly restricts competition because the Air Force has adequate specifications which reflect its needs and which would allow all generator manufacturers to compete. Essex currently produces a generator for the Government that meets these needs, and the requirements of clause C-65 limit potential offerors to two. Essex contends that this

restricted competition and, rather than furthering the goals of the CCAP, in fact, thwarts them. Essex cites Southern Methodist University, B-187737, April 27, 1977, 77-1 CPD 289, and B-147091, November 16, 1961, in support of its position.

The Air Force maintains that available military specifications for 72KW 400HZ DEGS do not meet its current minimum needs and that the generator currently manufactured by Essex for the Government in accordance with one of those specifications also does not meet its minimum needs. According to the Air Force, the only known market with needs similar to its own, utilizing these generators, is the commercial airline market and requiring market acceptibility is the only way available to ensure that its minimum needs will be met. In deciding whether clause C-65 is unduly restrictive of competition, we need not consider whether the goals of CCAP are being thwarted--if the clause is unduly restrictive, it violates the general requirement for maximum feasible competition in Government procurements.

We have consistently held that the determination of the needs of the Government, the methods for accommodating such needs, and the responsibility for drafting proper specifications reflective of such needs are primarily the responsibility of the contracting agency. Jarrell-Ash Division of the Fisher Scientific Company, B-185582, January 12, 1977, 77-1 CPD 19; Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181; Johnson Controls, Inc., B-184416, January 2, 1976, 76-1 CPD 4; 38 Comp. Gen. 190 (1958). It is proper for a contracting agency to determine its needs based on its actual experience, engineering analysis, logic or similar rational bases. Bowers Reporting Company, B-185712, August 10, 1976, 76-2 CPD 144. Though specifications should be drawn so as to maximize competition, we will not interpose our judgment for that of the contracting agency unless the protester shows by clear and convincing evidence that the agency's judgment is in error and that a contract awarded on the basis of

such specifications would by unduly restricting competition be a violation of law. Joe R. Stafford, B-184822, November 19, 1975, 75-2 CPD 324.

In AUL Instruments, Inc., B-186319, September 1, 1976, 76-2 CPD 212, a requirement for a commercial off-the-shelf item was protested as being unduly restrictive of competition, since it denied potential offerors the chance to show that their equipment was the equivalent of the commercial item. The requirement was included to minimize design and engineering risk by procuring a commercially proven item. We determined that the requirement was reasonable and did not unduly restrict competition.

Essex argues that AUL also stands for the general proposition that requiring that an item be sold in a particular market unduly restricts competition. The portion of AUL referred to by Essex, however, is narrower in scope, stating that restricting competition to a particular class of businesses is not justified when the same or equivalent item is offered by other businesses.

Essex has cited B-147091, November 16, 1961, as rejecting a requirement that a bidder must have previously marketed transmitters commercially. The following quotation was offered by Essex as supporting that proposition:

> "* * * As we stated in our decision B-147091 of September 22, 1961, we believe this requirement is subject to criticism in that it fails to give consideration to possible prior production of comparable equipments for the Government* * *."

The quoted statement was directed toward a requirement for FCC-type acceptance of commercial equivalents prior to bid opening. We have since recognized that a requirement for a commercial item

is a legitimate restriction in appropriate cases. See, for example, AUL, supra. Moreover, while we did criticize the requirement in B-147091, we stated that it "* * * is of some worth in the evaluation of bids, and we therefore do not consider it unduly restrictive."

Southern Methodist University, supra, also does not support Essex's position. The agency restricted competition to noneducational institutions solely to attempt to achieve a balance between educational institutions and private firms in the procurement of archeological surveys. There was no procurement related rational basis for such a restriction.

It is our opinion that the restriction in this case is reasonable in light of the Air Force's minimum needs. Essex has not shown that the minimum needs of the Air Force were not based on actual experience, engineering analysis or logic. The Air Force has supported its determination with test results. While Essex has alleged that existing Government specifications are sufficient to satisfy the needs of the Air Force, it has not shown this by clear and convincing evidence.

Additionally, International Harvester, supra; AUL, supra; and B-147091, supra, and October 30, 1961, all involved clauses requiring commercial products for purposes similar to those stated in C-65. While, competition was restricted in those cases, we did not find that it was unduly restricted and the requirements were permitted to stand. While competition in the present case is restricted to one commercial market, the restriction appears to be reasonably related to the Air Force's minimum needs. Since at least two technically acceptable offers were received, adequate competition was achieved. See, e.g., Armed Services Procurement Regulation (ASPR) § 3-807.1(b)(1)(a) (1976 ed.).

In Essex's comments on the agency's report on the protest, it first raised two additional issues. Essex argued that the existence of specifications required the Air Force to use formal advertising in this procurement rather than negotiation. Additionally, Essex argues that the amount of time allowed for meeting the first article testing requirement is unreasonably short. Both of these issues concern alleged patent solicitation defects and, therefore, are untimely since they were not raised prior to the closing date for initial proposals as required by § 20.2(b)(1) of our Bid Protest Procedures. 4 C.F.R. § 20.2(b)(1) (1977).

Accordingly, the protest is denied.

Deputy Comptroller General
of the United States